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The Effect of the Equal Rights Amendment on Minnesota Law

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Note: The Effect of the Equal Rights Amendment on Minnesota Law

I. INTRODUCTION

On March 22, 1972 the United States Senate passed the Equal Rights Amendment.¹ It has been sent to the states for ratification²—nearly 50 years after its initial introduction in 1923.³ The Amendment provides:

- (1) Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.
- (2) The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.
- (3) This amendment shall take effect two years after the date of ratification.⁴

The Amendment is intended to shift legal classifications based on sex to classifications based on individual attributes. "The law may operate by grouping individuals in terms of existing characteristics or functions, but not through a vast over-classification by sex."⁵ Even where it is demonstrated that some characteristic is found more often in members of one sex, there is no justification for different legal treatment of the sexes un-

1. H.R.J. Res. 208, 92d Cong., 2d Sess., 118 CONG. REC. 4612 (daily ed. Mar. 22, 1972) [hereinafter cited as H.R.J. Res. 208]. The House of Representatives passed the Equal Rights Amendment on October 12, 1971. See 117 CONG. REC. 9392 (1971).

2. Although as of March 3, 1973, 28 states had approved the Amendment, informed observers were indicating that there is considerable doubt whether the additional ten states needed for ratification would take favorable action in the foreseeable future. See N.Y. Times, Mar. 3, 1973, at 14, col. 3.

3. For a chart of the legislative history of the Amendment, see Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 981 (1971) [hereinafter cited as Brown *et al.*]. See also Martin, *Equal Rights Amendment: Legislative Background*, 11 J. FAMILY LAW 363 (1971).

4. H.R.J. Res. 208. Although the details of judicial interpretation of the Amendment cannot be known until the courts begin to rule on its effect, the intent of Congress has been clearly formulated. The report of the Senate Committee on the Judiciary, S. REP. NO. 689, 92d Cong., 2d Sess. (1972); the minority report (of Congressman Don Edwards and 13 other members of the House Judiciary Committee) of the house report on the Equal Rights Amendment, H.R. REP. NO. 359, 92d Cong., 1st Sess. (1971); and the extensive debate on the Amendment on the floor of the Senate, 118 CONG. REC. 4372-4612 (daily eds. Mar. 21-22, 1972), provide a general framework for judicial interpretation.

5. H.R. REP. NO. 359, *supra* note 4, at 6 (separate views of Congressman Edwards, *et al.*).

der the Equal Rights Amendment.⁶ Different treatment would result in a denial of equality of rights on the basis of sex for those persons who do not fit within the statistical norm. Thus, for example, a law prohibiting women from jobs requiring the lifting of weights in excess of 30 pounds would be considered an over broad classification based on sex, as there are members of both sexes who can lift such weights without injury and members of both sexes who cannot. A law could, however, constitutionally prohibit from employment all those unable to lift weights in excess of 30 pounds.

Two exceptions to the Amendment appear in the legislative history. First, intermingling of the sexes is not required where the right of privacy dictates that the sexes be separated, such as in private bathroom facilities.⁷ Included in this exception is "the traditional power of the State to regulate cohabitation and sexual activity by unmarried persons."⁸

This principle would permit the State to require segregation of the sexes for these regulatory purposes with respect to such facilities as sleeping quarters at coeducational colleges, prison dormitories, and military barracks.⁹

Second, reasonable classifications based on characteristics truly unique to one sex are not proscribed.¹⁰ The legislative history of the Amendment indicates, however, that this exception should be given the narrowest possible effect.¹¹ Only where character-

6. *Id.*

7. *Id.* at 7.

8. *Id.*

9. *Id.*

10. "For example, a law providing for payment of the medical costs of child bearing could only apply to women." *Id.*

11. See note 4 *supra*. The amendments to the Equal Rights Amendment that were proposed and defeated on the floor of the Senate may also clarify congressional intent. These amendments, introduced by Senator Ervin, include one which would have exempted all state and federal laws which "extend protections or exemptions to women." No. 1068, 118 CONG. REC. 4531 (daily ed. Mar. 22, 1972); an amendment which would have exempted from the coverage of the Amendment any law which imposed responsibility upon fathers to support their children. No. 1069, 118 CONG. REC. 4538 (daily ed. Mar. 22, 1972); and an amendment which would have exempted all laws which distinguished between men and women if the distinction "is based on physiological or functional differences between them." No. 472, 118 CONG. REC. 4551 (daily ed. Mar. 22, 1972) (emphasis added). Because the phrase "functional difference" was left ambiguous, such language would have permitted a court to use a much more liberal test to determine whether a law was constitutional under the Amendment than it could under the language of the Amendment as finally enacted. For example, if a husband's role as the wage earner were seen as a functional difference, a statute which required that only the husband had a

istics are clearly found *only* in members of one sex will a classification be constitutional.¹²

All states¹³ have laws which would likely be found unconstitutional under the Amendment. Although Minnesota has fewer such laws than the majority and has several laws specifically forbidding sex discrimination,¹⁴ many Minnesota stat-

duty of support would be held constitutional. For the result on this question under the Amendment as enacted, see text accompanying notes 23-33 *infra*.

12. L. KANOWITZ, *THE LAW SCHOOL CURRICULUM AND THE LEGAL RIGHTS OF WOMEN: PROPERTY 15* (mimeo) (1972) states:

It is clear from the legislative history of the federal ERA that, except in those rare and narrowly defined circumstances where discernible sex-based *biological* differences clearly justify sex distinctions in the law, the Amendment would absolutely prohibit any official discrimination or distinction based upon sex. Thus, it has been suggested, that under the Equal Rights Amendment certain distinctions based upon sex, such as a state's regulation of wet nurses and sperm donors, would continue to be permissible. The reason for this is that these biological differences inhere in the very nature of the sexes. But if a state attempts to distinguish between the sexes merely on the basis of statistical probability or widespread generalization, it would violate the equal rights principle.

13. The Amendment, of course, reaches only state action and not purely private action. H.R. REP. NO. 359, *supra* note 4, at 7. Thus the Amendment would reach federal and state laws, and actions which come within the realm of "state action." The determination of whether or not an act is state action under the Equal Rights Amendment would follow the case law developed under the Fourteenth Amendment. *Id.*

14. MINN. STAT. § 363.03(1) (1971) forbids discrimination in employment on the basis of sex. MINN. STAT. §§ 181.66-.68 provide that employees must receive equal pay for equal work without regard to sex. In addition, a few Minnesota statutes have recently been amended so that they apply equally to men and women. These include the alimony statute which formerly defined alimony as "an award made in a divorce proceeding of payments from the future income or earnings of the husband for the support and maintenance of the wife only." MINN. STAT. § 518.54(3) (1967). In 1969 this subdivision was amended to read, "'Alimony' means an award made in a divorce proceeding of payments from the future income or earnings of one spouse for the support and maintenance of the other." Minn. Laws ch. 1028 § 2 (1969). The Minnesota Child Custody statute was also revised in 1969. Prior to that time no mention was made of the effect of the sex of the parent on child custody awards upon divorce. MINN. STAT. § 518.17 (1967), as amended, MINN. STAT. § 518.17 (1971). In 1969, the following sentence was added:

In determining the parent with whom a child shall remain, the court shall consider all facts in the best interest of the children and shall not prefer one parent over the other solely on the basis of the sex of the parent.

MINN. LAWS ch. 1030 (1969).

The Minnesota Supreme Court recently altered Minnesota's common law rule on loss of consortium. The traditional common law rule had been that, while the husband had an action in tort for loss of consortium with his wife, a wife had no action in tort for the loss of her

utes and common law rules would likely be held unconstitutional if the Amendment is ratified. Since the judicial system can provide only a limited response to a determination that a law is unconstitutional, such challenges will present difficult problems for the judiciary. Courts may either invalidate the statute or extend its application to members of both sexes.¹⁵ The legislative branch, on the other hand, is equipped with the power to deal completely and efficiently with the complex policy issues involved in revising a large body of statutory and common law and could avoid numerous case by case challenges through statutory revision. Section three of the Equal Rights Amendment allows the Legislature time to accomplish that task by delaying operation of the Amendment for two years after ratification. This note will deal with those Minnesota statutes and common law rules which are most likely to be brought under judicial scrutiny if the Amendment is ratified, and will suggest alternatives for legislative revision which could fulfill the requirements of the Amendment.

II. THE MARITAL RELATIONSHIP

The Equal Rights Amendment will probably have its greatest impact on statutes and common law doctrines dealing with the relations of husband and wife. Much of the law of domestic relations is based on the assumption, deeply entrenched in the

husband's services. *Eschenbach v. Benjamin*, 195 Minn. 378, 263 N.W. 154 (1935). In *Thill v. Modern Erecting Co.*, 284 Minn. 508, 170 N.W.2d 865 (1969), the court, in holding that a wife has a cause of action for loss of consortium, stated:

[T]he wife's right to maintain an action for loss of consortium is now recognized in numerous jurisdictions. This results from recognition of the equal status of the partners in the marriage relationship and a rejection of the medieval concept that the husband had a proprietary right to his wife's services, mainly domestic service, but that the wife, as the property of her husband, had no reciprocal right to his.

284 Minn. at 511-12, 170 N.W.2d at 868 (1969) (footnotes omitted).

15. If the latter alternative is selected, there may sometimes be a question as to the proper basis for equalization. . . .

...
In determining the impact of a constitutional provision upon a non-conforming statute, courts look primarily to the legislative intent behind the statute in question. Whether the statute falls completely or is modified in some way depends upon the court's assessment of what the legislature itself would have done had it known that all or part of its original enactment would be invalid. Of course, such legislative intent is often not easily ascertained. Where legislative history is scant, or lacking altogether, there is little for courts to rely on except their own judgment about what the legislature must have intended.

Brown et al., *supra* note 3, at 913-14.

common law, that the husband is the legal head and wage earner of the family and the wife is the child rearer and keeper of the home.¹⁶ Laws which give legal effect to this supposition assign husband and wife different rights and duties. They do not designate obligations on the basis of existing characteristics or functions, but purely on the basis of sex.¹⁷ Unless these laws fall within one of the two narrow exceptions to the Amendment,¹⁸ they will violate its general mandate.

A. HISTORICAL PERSPECTIVE

Late in the nineteenth century, the legislature enacted Minnesota's version of the Married Women's Act.¹⁹ The act was intended to partially abrogate the common law doctrine of coverture, which declared that upon marriage a woman's legal identity was merged with that of her husband, and she could not contract, sue or be sued, convey land, or enter into a business.²⁰ Married Women's Acts were enacted throughout the United States in order to place married women in an equal legal position with single women, primarily in the areas of property and contract relations.²¹

The language of the first section of the Minnesota Married Women's Act is sweeping:

Women shall retain the same legal existence and legal personality after marriage as before, and every married woman shall receive the same protection of all her rights as a woman which her husband does as a man, including the right to appeal to the courts in her own name alone for protection or redress²²

16. See H. CLARK, *LAW OF DOMESTIC RELATIONS* 181 (1968).

17. The legislative history of the Equal Rights Amendment makes it clear that laws that distinguish between men and women cannot stand even if it can be demonstrated that some characteristic or function is found more often in one sex than another. See note 11 *supra*.

18. See text accompanying notes 7-12 *supra*.

19. MINN. STAT. ch. 519 (1971).

20. Kanowitz, discussing Married Women's Acts, points out that [t]hough the precise wording and scope of these statutes varied from state to state, they were all products of conscious and deliberate legislative efforts to redress property and contract relations between wives and husbands and to remove previous procedural disabilities of married women.

L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 40 (1969). See also 1 W. BLACKSTONE, *COMMENTARIES* *442:

By marriage, the husband and wife are one person in the law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband. . . .

21. L. KANOWITZ, *supra* note 20 at 40.

22. MINN. STAT. § 519.01 (1971).

However, judicial interpretation has limited the scope of this section and other portions of the Married Women's Act.²³ Only property and contract rights are affected by the Act.²⁴ And because the Minnesota Supreme Court has not had occasion recently to deal with the broad issue of the effect of the Act on common law doctrines affecting the marriage relationship, many common law doctrines, such as those affecting domicile, a married woman's name, and the husband's duty of support, retain their validity. In addition, different treatment of husband and wife remains in inheritance tax and minimum marriage age laws.

B. MARRIED WOMEN AND THE DUTY OF SUPPORT

Section 519.05 of the Married Women's Act²⁵ provides that a wife shall not be liable for the debts of her husband and that a husband shall not be liable for "any torts, debts or contracts of his wife, committed or entered into either before or during coverture" Further, the husband and wife are jointly and severally liable for all necessary household articles furnished to and used by the family.²⁶ However, the husband is liable for "necessaries" furnished to his wife "where he would be liable at common law."²⁷ Thus, although the statute expressly incorporates the common law rule that imposed a duty upon the husband to support his wife,²⁸ there is no reciprocal obligation placed on the wife. Further, the Minnesota Supreme Court has

23. See *State v. Arnold*, 182 Minn. 313, 315, 235 N.W. 373, 374 (1931); *Friburk v. Standard Oil Co.*, 66 Minn. 277, 68 N.W. 1090 (1896).

24. See cases cited in note 23 *supra*.

25. MINN. STAT. § 519.05 (1971) states:

No married woman shall be liable for any debts of her husband, nor shall any married man be liable for any torts, debts, or contracts of his wife, committed or entered into either before or during coverture, except for necessities furnished to the wife after marriage, where he would be liable at common law. Where husband and wife are living together, they shall be jointly and severally liable for all necessary household articles and supplies furnished to and used by the family.

26. *Id.*

27. *Id.* What constitutes "necessaries" has been the subject of much discussion. See generally, Paulsen, *Support Rights and Duties Between Husband and Wife*, 9 VAND. L. REV. 709, 736 (1956). In *Bergh v. Warner*, 47 Minn. 250, 50 N.W. 77 (1891), the Minnesota Supreme Court stated:

The term "necessaries," in its legal sense, as applied to a wife, is not confined to articles of food and clothing required to sustain life or preserve decency, but includes such articles of utility, or even ornament, as are suitable to maintain the wife according to the estate and rank of her husband.

Id. at 252, 50 N.W. at 78.

28. See *Boland v. Morrill*, 275 Minn. 496, 148 N.W.2d 143 (1967).

held that the husband has a duty to provide necessities for his wife even though she has independent means.²⁹ In addition, the court has held that although the wife may be held liable to third parties for debts incurred in the purchase of household articles, the husband can be held liable to his wife for reimbursement unless the wife has voluntarily used her own funds to make the purchase, with no expectation of repayment.³⁰

Minnesota statutory and case law, therefore, provides two separate duties of support: 1) the husband is bound under statutory law³¹ to support his wife and may be held liable for her purchases charged to his credit where the items purchased are "necessaries" and he has failed to purchase necessities for her and failed to provide her with the means to purchase them herself; and 2) as between husband and wife, the husband is ultimately responsible for the support of the family.³² Both support obligations will likely be violative of the Equal Rights Amendment as they place a burden of support on married men which they do not place on married women. The classification is based on sex and does not fall within the narrow exceptions

29. See *Rotering v. Hibbard*, 168 Minn. 502, 210 N.W. 395 (1926).

30. See *Kosanke v. Kosanke*, 137 Minn. 115, 162 N.W. 1060 (1917). In that case, a widow sued the estate of her deceased husband for reimbursement of money she paid for household expenses during her husband's lifetime. The husband had repaid her for a portion of her expenditure. The court rejected the estate's contention that, as § 519.05 makes husband and wife jointly and severally liable for all necessary household articles, the wife was "merely paying her own debt and [was] not entitled to reimbursement therefor." *Id.* at 116, 162 N.W. at 1060. The court held:

Although this statute makes both husband and wife liable to third parties for [household] necessities, it does not relieve the husband from the duty to support the family which has rested upon him from time immemorial, and as between husband and wife the duty to furnish such necessities still rests upon the husband.

Id.

31. MINN. STAT. § 519.05 (1971).

32. See note 30 *supra*. See also *Peterson v. Swan*, 239 Minn. 98, 57 N.W.2d 842 (1953). The wife's ability to enforce her right to support in an ongoing marriage is severely constrained. The law does not grant a woman the right to obtain a cash allowance from her husband; it does allow a wife to use her husband's credit, but if he has notified local businessmen not to allow purchases on his credit, they will be hesitant to accommodate the wife. In such circumstances, the wife is left with no method of obtaining cash support from her husband short of separation. See *Paulsen*, *supra* note 27, at 735-40. See also *McGuire v. McGuire*, 157 Neb. 226, 59 N.W.2d 336 (1953), where the Nebraska Supreme Court articulated the general rule that a court will not award support to a wife in an ongoing marriage.

of the right of privacy or unique physical characteristics.³³ The statute is apparently based on the presently unwarranted assumption³⁴ that the husband is always the sole wage earner in the family and the wife is always the keeper of the home.³⁵

The statute could be revised to provide that neither spouse shall have an obligation to support the other, or alternatively that both spouses have a support obligation. Under the latter scheme, where one spouse earns family income and the other contributes domestic services, the former has the obligation. Although the first alternative would be permissible under the Amendment, it would hamper family life. Creditors would be unwilling to extend necessary credit to a spouse earning no income but providing household services. As long as it is common for one member of a household to provide most of the income, while the other provides uncompensated personal services, such as child rearing,³⁶ the law should insure that the spouse who receives no direct payment for his or her contribution to the family unit has a protectable interest in the income of that unit.

The alternative of placing a mutual burden of support on husband and wife is therefore more desirable. The Association of the Bar of the City of New York has outlined the effect of such a statute:

[I]f spouses have equal resources and earning capacities, each would be equally liable for the support of the other—or in practical effect, neither would be required to support the other. On the other hand, where one spouse is the primary wage earner and the other runs the home, the wage earner would have a duty to support the spouse who stays at home in compensation for the performance of her or his duties.³⁷

The wording of such a statute need not be complicated. It could provide simply that

Every man shall support his wife, and his children. Every

33. See text accompanying notes 7-12 *supra*. See also Brown *et al.*, *supra* note 3, at 945; BAR ASSOCIATION OF THE CITY OF NEW YORK, REPORT ON THE EQUAL RIGHTS AMENDMENT (1971).

34. See text accompanying note 16 *supra*.

35. Courts have been unwilling to recognize that this basic assumption simply does not apply in many cases. See *Hill v. Commissioner*, 88 F.2d 941 (8th Cir. 1937). Rather, it is a classification which bears little relationship to the economic reality of the modern American family, where almost 50% of all wives are in the labor force and 38% of all mothers with children under 18 years of age were in the labor force in March 1967. WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, BULL. NO. 294, 1969 HANDBOOK ON WOMEN WORKERS 37.

36. This family pattern may be changing. See note 35 *supra*.

37. BAR ASSOCIATION OF THE CITY OF NEW YORK, *supra* note 33, at 8.

woman shall support her husband and her children.³⁸

The statute could further provide, in the language of the present Minnesota statute, that

Where husband and wife are living together they shall be jointly and severally liable for all necessary household articles and supplies furnished to and used by the family.³⁹

The rights and liabilities of the spouses *inter se* would be controlled by the first provision. Thus, a husband could not be required to reimburse his wife for necessary articles which she purchased for the household if she had financial resources of her own, as she would simply be fulfilling her obligation of support.⁴⁰ The second provision would require that the property of both husband and wife be subject to debts incurred by the purchase of household articles from third parties.⁴¹ The doctrine that, as between husband and wife, the husband is ultimately responsible for such debts would presumably be abrogated.⁴²

Although in the foreseeable future women will more often need the protection of such a statute, the husband will have a protectable interest in her income in those cases where it is the woman who is the primary earner. Further, the wife would not

38. The language of this provision is modeled in part on § 2-3 of the Uniform Civil Liability for Support Act which provides that Every man shall support his wife, and his child; and his parent when in need.

Every woman shall support her child; and her husband and her parent when in need.

The Act itself would be unacceptable under the Equal Rights Amendment, as it places an unequal support burden on the husband. The husband is under a duty to support his wife at all times, while the wife must support her husband only when he is in need.

39. MINN. STAT. § 519.05 (1971).

40. Upon divorce, property purchased for the household would be divided between the spouses according to the procedure established in MINN. STAT. § 518.58 (1971):

Upon a divorce for any cause, or upon an annulment, the court may make such disposition of the property of the parties acquired during coverture as shall appear just and equitable, having regard to the nature and determination of the issues in the case, the amount of alimony or support money, if any, awarded in the judgment, the manner by which said property was acquired and the persons paying or supplying the consideration therefor, the charges or liens imposed thereon to secure payment of alimony or support money, and all the facts and circumstances of the case.

41. It should be emphasized that this liability is limited to necessary household articles. Purchases made by one spouse for his or her own personal use would not come under this provision. However, if the personal article is a "necessary" such as clothing for the spouse, the other spouse could be held liable if he or she were the sole wage earner, and therefore had a duty of support.

42. See discussion of past judicial interpretation of this provision at text accompanying note 30 *supra*.

be able to avoid financial responsibility for her own support in those families where husband and wife contribute equally to the total family income.

Another alternative would be to provide that husband and wife have vested rights in the total earnings and property of the family unit. Such a proposal was made in 1963 by the Committee on Civil and Political Rights of the President's Commission on the Status of Women:⁴³

[T]he Committee concludes that during marriage each spouse should have a legally defined and substantial right in the earnings of the other spouse and the real and personal property acquired as a result of such earnings, as well as in the management of such earnings and property. Such right should survive in the event of its termination by annulment, divorce, or death. This policy should be appropriately implemented by legislation which would safeguard either spouse against improper alienation of property by the other.⁴⁴

The Minnesota legislature could look to the community property states for guidance in this area.⁴⁵ However, community property systems are not without inequalities based on sex and major modifications of that system would thus be necessary.⁴⁶

43. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, COMMITTEE ON CIVIL AND POLITICAL RIGHTS, Recommendation 14, at 18 (1963).

44. *Id.*

45. In comparing community property and common law property systems, it has been said:

That the community system was far superior to the former barbarous common law system few would deny. Whether that superiority exists when comparison is made with the modernized common law system, with its ameliorative Married Woman's Property Acts, is a debatable question. To a large extent one's views will be shaped by his prejudices and judgments of marriage as a sociological institution. In favor of the community system it may be urged that it gives realistic recognition to the contributions made by both spouses to the material success of the marriage. Moreover, as a legal system it is, perhaps, more accurately reflective of actual marital customs and usages than its rival system. It has been asserted, with considerable justification, that the community idea exists extra-legally to a substantial degree in the common law states. Broadly speaking, the community system may be said to constitute a *de jure* recognition of a *de facto* marital partnership.

2 AMERICAN LAW OF PROPERTY § 7.5 (A.J. Casner ed. 1952).

46. For extensive discussion of the effect of community property laws on women, see J. YOUNGER, COMMUNITY PROPERTY, WOMEN AND CURRICULUM (mimeo) (1972). For example, most community property systems give the husband sole power of control over the property and income of the community. ARIZ. REV. STAT. ANN. § 25-211B (1956); CAL. CIV. CODE § 5125 (West 1970); IDAHO CODE § 32-912 (1963); LA. CIV. CODE ANN. art. 2404 (West 1971); NEV. REV. STAT. § 123.230 (1967); N.M. STAT. ANN. § 57-4-3 (1962).

A community property bill has been introduced in New York and is designed to assure equal rights and duties for husband and wife. A

A community property system is more representative of the realities of the American family since it recognizes the contribution of both partners to the marital relationship. It would more effectively minimize dependence of the nonearning spouse on his or her mate. Because of its complexity, however, enactment would require more extensive revision of Minnesota law than would imposing a duty of support upon both husband and wife. Hopefully, either alternative would encourage the further development of individualized treatment of men and women under the law, the ultimate purpose of the Equal Rights Amendment.

C. MARITAL AGE REQUIREMENTS

Section 517.02 provides that a male may marry without parental consent at age 21, and with parental consent at 18. A female may marry without parental consent at 18 and with parental consent and the approval of a juvenile court judge at 16.⁴⁷ The distinction between males and females present in section 517.02 and other related statutes⁴⁸ is one which is common throughout the United States.⁴⁹ It is based in large part on English common law, which in turn was based on assumptions as to different ages of physiological maturity of males and females.⁵⁰

The statute would be open to challenge as violative of the Equal Rights Amendment since it provides a lower minimum

description of the bill is contained in 2 WOMEN'S RIGHTS LAW REPORTER 17 (1972). For the most complete version of the bill itself see Assembly No. 10741.

47. MINN. STAT. § 517.02 (1971) provides in pertinent part:

Every male person who has attained the full age of 21 years, and every female person who has attained the full age of 18 years, is capable in law of contracting marriage, if otherwise competent. A male person of the full age of 18 years may, with the consent of his parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry. A female person of the full age of 16 years may, with the consent of her parents, guardian, or the court, as provided in Minnesota Statutes, Section 517.08, receive a license to marry, when, after a careful inquiry into the facts and the surrounding circumstances, her application for a license is approved by the judge of the juvenile court of the county in which she resides

48. MINN. STAT. § 517.02 (1971); MINN. STAT. § 517.08 (1971).

49. Brown *et al.*, *supra* note 3, at 938. See also L. KANOWITZ, *supra* note 20, at 10.

50. "The common law ages of consent—14 for males, 12 for females—represented estimates of the ages when children became physically capable of producing children." Brown *et al.*, *supra* note 3, at 938 n.138. Although the age of consent has been increased for both males and females, the differential between the ages for males and females has remained.

marriage age for women than for men.⁵¹ As the minimum marriage age is well above the normal age of puberty, it cannot be argued that the legal distinction rests on biological differences between the sexes. One arguable rationale for the distinction is that women mature mentally and emotionally earlier than men.⁵² Although this may hold true as a generalization, it "is such a relative and subjective concept that a court could never use it as a test for an inborn characteristic distinguishing all women from all men."⁵³ Such a justification for the law involves the kind of averaging which is forbidden by the Equal Rights Amendment.⁵⁴ Another equally unacceptable rationale is that males should not be distracted during adolescence by the responsibilities of marriage.⁵⁵ Although this argument could be used to justify a higher marriage age for *both* males and females, since women could be equally distracted by such responsibilities, it cannot be advanced as a reason for imposing a higher minimum on one sex than on the other. It seems quite likely, therefore, that if the Amendment is ratified and the Minnesota minimum marriage age statute is subsequently challenged, a court would find that the law classifies and assigns different legal rights and duties on the basis of sex.⁵⁶ Because the sex based distinctions do not fall within either of the narrow exceptions to the general rule of the amendment,⁵⁷ the law would be invalidated.

Although the legislature is constitutionally free to choose any minimum age so long as it applies to both sexes,⁵⁸ it will

51. *Brown et al*, *supra* note 3, at 938. See also discussion of the constitutional tests likely to be applied under the Equal Rights Amendment at text accompanying notes 7-12 *supra*.

52. *Brown et al.*, *supra* note 3, at 939.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See text accompanying notes 7-12 *supra*.

58. Several states presently have equivalent age requirements for males and females. As of December 1, 1969 the following states required the same minimum age for males and females for marriage without parental consent: Connecticut (21), Delaware (19), Florida (21), Georgia (19), Kentucky (18), Louisiana (21), Michigan (18), Mississippi (21), Nebraska (21), North Carolina (18), Ohio (21), Pennsylvania (21), Rhode Island (21), South Carolina (18), Tennessee (21), Virginia (21) (changed to 18 in 1971, see note 70 *infra*), West Virginia (21), and Wyoming (21). The following states required the same minimum age for males and females for marriage with parental consent: Colorado (16), Connecticut (16), Kansas (18), Maine (16), Missouri (15), North Carolina (16), Pennsylvania (16), Tennessee (16), and Washington (17). See generally WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, MARRIAGE LAWS AS OF DECEMBER 1, 1969.

have to resolve competing policy issues before making a determination as to the proper minimum age. There are data which indicate that marriages of parties between 18 and 21 are more likely to end in divorce than marriages contracted when the parties are over 21.⁵⁹ However, the national trend in other areas, such as voting rights,⁶⁰ has been to lower the legal minimum age requirement to 18. In a number of states the legal age of adulthood has been lowered to 18.⁶¹ The drafters of the Uniform Marriage and Divorce Act provided for marriage without consent at 18 years of age for both sexes.⁶² In a society where 18 year olds are being given increasing amounts of freedom of choice and increasing responsibility, it would seem that the choice of age 18 for marriage without consent is the proper one.

Parental and judicial consent requirements will also require revision since Minnesota law provides different minimum ages and procedures for males and females.⁶³ Girls are allowed to marry at 16 with parental and juvenile court consent,⁶⁴ while boys are allowed to marry at 18 with parental consent.⁶⁵ The

59. See Monahan, *Does Age at Marriage Matter in Divorce?*, 32 SOCIAL FORCES 81 (1953), and *Spotlight on Marriage*, in M. SUSSMAN, SOURCEBOOK ON MARRIAGE AND THE FAMILY 3, 12 (1963).

60. U.S. CONST. amend. XXVI.

61. See, e.g., VA. CODE ANN. § 1-13.42 (1972):

(a) Unless a different meaning appears from the context: . . .

(3) The word "adult" shall be construed to mean a person eighteen years of age or over.

62. UNIFORM MARRIAGE AND DIVORCE ACT § 203 (1970).

63. MINN. STAT. § 517.02 (1971).

64. *Id.* Foote, Levy, and Sander indicate that:

In administering the statute, the Juvenile Court of Hennepin County (Minneapolis) requires that the applicant, her prospective spouse, their parents, and their clergyman answer a questionnaire about the parties, their backgrounds, and the chances for success of their marriage. The applicants are given a full physical examination; a probation officer interviews them and their parents and makes a full report to the court. The questionnaire to the applicants includes such items as: "How many school dances and parties attended together during last year"; "Presents exchanged last Christmas, birthday (given and received)"; "When first discuss marriage"; "Give prospective spouse ring." The parents are asked to evaluate their child's prospective spouse (e.g., "Is that person as intelligent as your child?"), to describe the future educational needs of their child and the couple's financial prospects, and to assess their feelings about the applicant's pregnancy

The Probation Officer handling these applications believes that most of the couples who do not receive Juvenile Court permission go immediately to South Dakota and get married in that state by lying about their ages.

C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 225 (1st ed. 1966).

65. MINN. STAT. § 517.02 (1971).

Uniform Marriage and Divorce Act permits marriage with parental consent or judicial approval at 16 for both sexes, and allows marriage under the age of 16 with parental consent *and* judicial approval.⁶⁶ Despite the fact that most sociologists agree that marriage at these ages has very significant risks,⁶⁷ this would seem to be an acceptable legislative choice.

D. LEGAL NAME

Although no Minnesota statute requires a married woman to adopt her husband's surname, the common law rule is that a married woman's name consists of her given name and her husband's surname.⁶⁸ Commentators disagree as to whether the requirement that a woman adopt her husband's name at marriage has the force of law or is merely a tradition or custom. Bromley⁶⁹ states in his book on English family law that "[b]y custom, on marriage a wife assumes her husband's surname and, if he is a peer, his title and rank."⁷⁰ However, the United States Supreme Court in a recent case⁷¹ affirmed without opinion a Federal District Court decision⁷² rejecting a claim that an unwritten Alabama regulation requiring married women to use their husbands' surnames in driver's license applications was a denial of equal protection. In light of this decision, it seems likely that if the common law rule in Minnesota⁷³ were challenged on equal protection grounds the Minnesota Supreme Court would accord the rule the force of law.

Because the common law rule requires a married woman to adopt her husband's surname, the rule is contrary to the clear intent of the Equal Rights Amendment since it defines a duty

66. UNIFORM MARRIAGE AND DIVORCE ACT §§ 203, 205 (1970).

67. See Monahan, *supra* note 59, at Table 3.

68. Hughes, *And Then There Were Two*, 23 HASTINGS L.J. 233 (1971). See also Brown v. Reinke, 159 Minn. 458, 199 N.W. 235 (1924).

69. P. BROMLEY, FAMILY LAW (4th ed. 1971).

70. *Id.* at 95. See also State *ex rel.* Krupa v. Green, 114 Ohio App. 497, 177 N.E.2d 616 (1961).

71. Forbush v. Wallace, 405 U.S. 970 (1972).

72. 341 F. Supp. 217 (M.D. Ala. 1971). The court supported the notion that the question of a married woman's name is a common law rule rather than a mere custom.

73. In a recent unreported decision, Judge Douglas Amdahl of the Hennepin County District Court allowed a married woman to change her last name to her maiden name with permission of her husband. Minneapolis Tribune, April 18, 1972, at 1A cols. 7&8). However, that case is quite different from one in which a woman asserts the right to *retain* her maiden name upon marriage without submitting to the official name change procedure.

solely in terms of sex.⁷⁴ The legislature has several options if it wishes to draft a statute consistent with the Amendment's provisions. It could require that husband and wife bear the same name, leaving it up to the couple to select an acceptable name. Under this system, a couple could choose to be known by the husband's name, the wife's name, or by some third name (which could be a hyphenation of their names). A second alternative would be to grant a woman the option of retaining her maiden name at the time the marriage license issues, a procedure similar to one passed in Wisconsin in 1969.⁷⁵ Under this procedure a woman's name would be part of the public record of her marriage, and she could produce her copy of the appropriate form if questions arose as to her legal name. A third legislative alternative is a statute which would allow persons upon application for a marriage license to choose a family name, or, alternatively, to elect to retain their previous names. This procedure combines the first two alternatives and would allow the greatest latitude. A couple could choose any name for the family name, or retain their own names.

The first suggested option has the advantage of retaining the tradition of the "family name" while at the same time avoiding the presently discriminatory practice of requiring that the husband's name be used. Such a system further avoids the problem of establishing a procedure for the name of children. Children would take the official family name, whether it were the husband or wife's surname, or a third name. However, this system does not allow flexibility for situations where both husband and wife, for whatever reasons, find it essential to retain their own

74. The problem of a married woman's legal name is a real one. A woman who chooses to retain her maiden name upon marriage may encounter serious difficulty when she attempts to register to vote, to obtain a driver's license, and to obtain credit. In addition, a legal requirement that a woman use her husband's name involves a symbolic deprivation of the individual identity of the married woman.

75. Wisconsin Assembly Bill No. 781 (1969). The Governor vetoed the bill. WISCONSIN LEGISLATIVE REFERENCE BUREAU, BULL. NO. 70-3, THE EXECUTIVE VETOES IN WISCONSIN 24 (1970). The bill provided:

(1) Any woman named on a marriage license may, at the time the license is issued, elect to retain her maiden name or other permissible previous name. Such election shall be made in writing and signed by her on a form provided under S. 245.20 and shall be attached to the copy of the marriage license retained by the county clerk.

(2) A name retained by a woman under this section shall be that woman's name for all legal purposes including business affairs and elections to public offices.

This alternative would require that the woman assume the husband's surname if she did not exercise the option.

surnames. As more women enter the professional world they will find it advantageous to retain the name under which they have become known.⁷⁶ Further, in a society in which 455 out of every 1000 marriages are destined for divorce,⁷⁷ it is possible under the present single name requirement for a person to go through several name changes, which results in loss of identity and administrative confusion. The first option would perpetuate this inefficiency.

The second option, a statute similar to one passed and vetoed in Wisconsin, has been subject to serious criticism. The governor in his veto message stated:

[T]o my knowledge, this legislation is unique. Both by custom, and legally, since the time of Edward IV, the wife has taken her husband's surname as her own.

....

Our property, commercial and domestic relations law is based on this premise. The enactment of this legislation would necessitate alternation of law, legal forms, contracts and data processing procedures. It could lead to practical difficulties in landlord and tenant relations, service of papers, determination of claim of title and ability of law enforcement agencies to determine the whereabouts of individuals.⁷⁸

Most of this criticism is not persuasive. Virtually all identification procedures in our society are based on numbers rather than names. Forms might simply be altered to allow both parties to enter their last names. Further, whether a person is known by Mary Doe or Mary Roe does not significantly affect identification procedures if one name is used consistently and exclusively. Allowing a person to keep the name she has used all her life would arguably result in less administrative confusion than the name change presently required upon marriage.

This system does, however, present a difficult problem in naming children where a couple chooses to retain separate names. It is clear that a statute which required that the children's last name be that of the father would be suspect under the Equal Rights Amendment,⁷⁹ as would a provision requiring that the mother's name be adopted. The choice of a last name could

76. A woman in public or professional life stands to suffer a real loss of recognition if she alters her name upon marriage, particularly if there are successive marriages.

Kay, *Text Note on Married Woman's Loss of Identity* 3, in H. KAY, R. LEVY, C. ATTWOOD, K. GEHRELS, *MATERIALS PREPARED FOR THE AALS SYMPOSIUM ON THE LAW SCHOOL CURRICULUM AND THE LEGAL RIGHTS OF WOMEN: FAMILY LAW MATERIALS* (1972) (mimeo).

77. New York Post, July 6, 1972, at 23, col. 5.

78. WISCONSIN LEGISLATIVE REFERENCE BUREAU, *supra* note 75.

79. See text accompanying notes 5-12 *supra*.

be left to the discretion of the parents, just as first names are selected. However, this might result in litigation between parents unable to reach a mutually satisfactory decision. Courts would be hard pressed to establish rational rules upon which to resolve such intra-family conflicts. One solution is a statutory presumption that the last name of a child whose parents had different last names would be a hyphenation of their names. The presumption would prevail in the absence of a choice acceptable to both parents.

The third legislative alternative, allowing the couple to choose a family name or retain their separate names, appears to be the most attractive. It is likely that most couples would choose a family name for the sake of convenience. However, such a statute would allow for those situations where a person for professional or other reasons wishes to retain her or his name. This scheme, like the second option, would require a statutory method for the naming of children where husband and wife retain separate names.

Two Minnesota statutes dealing with names would also require revision in order to be within the provisions of the Equal Rights Amendment. Section 259.10, which sets out the statutory procedure for changing names, provides that a married man may have his name and the names of his minor children and his wife changed if the wife joins in the application.⁸⁰ There is no procedure for a married woman to change her name or the names of her children. Further, there is no requirement that a mother concur in a father's request to change the names of his minor children. If the Amendment is ratified it will be necessary to provide that a married man or woman may independently change his or her name, but that the names of minor children cannot be changed without the concurrence of both parents so long as they remain married.

Section 518.27, which provides that a court may change the name of a woman who sues for divorce,⁸¹ should also be revised

80. MINN. STAT. § 259.10 (1971) states:

A person who shall have resided in any county for one year may apply to the district court thereof to have his name, the names of his minor children, if any, and the name of his wife, if she joins in the application, changed in the manner herein specified. He shall state in his application the name and age of his wife and each of his children, if any, and shall describe all lands in the state in or upon which he claims any interest or lien, and shall appear personally before the court and prove his identity by at least two witnesses

81. MINN. STAT. § 518.27 (1971) provides:

When a decree of divorce from the bonds of matrimony is

to allow a married man to change his name on divorce if he changed his name upon marriage.⁸²

E. A MARRIED WOMAN'S DOMICILE

The common law rule in Minnesota is that a married woman's domicile is that of her husband, unless she is separated from him for cause.⁸³ A person's domicile affects his or her right to vote, right to pay in-state tuition at state universities and colleges, and rights to sue and be sued in federal court.⁸⁴ In addition, the husband's right to fix the family's domicile means that if the wife fails to join him without cause she may be charged with desertion.⁸⁵ The rule as to a married woman's domicile is similar to the rule applied to children in that both classes of persons are assigned a domicile by operation of law.⁸⁶ The wife's domicile is with her husband, the child's with his parents.⁸⁷ On the other hand, men have the right to choose a domicile.⁸⁸ Thus, while as a general rule a man's domicile is determined by where he lives and has a present intention to remain, a married woman's domicile lies wherever her husband lives, even though he lives in a different state.⁸⁹

granted in this state, such decree shall completely dissolve the marriage contract as to both parties. In all actions for a divorce brought by a woman, if a divorce is granted, the court may change the name of such woman, who shall thereafter be known by such name as the court designates in its decree.

82. See text accompanying notes 74-80 *supra*.

83. *Harer v. Harer*, 153 Minn. 317, 190 N.W. 343 (1922) (husband has right to select domicile, but the choice must be exercised with reasonable consideration for wife); *Taylor v. Taylor*, 177 Minn. 428, 225 N.W. 287 (1929) (there are circumstances in which the wife may make a qualified refusal to join husband at his chosen domicile). *But see State ex rel. Larson v. Larson*, 190 Minn. 489, 252 N.W. 329 (1934) (wife may acquire separate domicile on judicial decree of divorce or separation); and *Op. Att'y GEN.* no. 273, 218 (1922) (wife may have different domicile for voting purposes).

84. See H. CLARK, *LAW OF DOMESTIC RELATIONS* 145 (1968).

85. *Taylor v. Taylor*, 177 Minn. 428, 431, 225 N.W. 287, 288 (1929).

86. The other type [of domicile] is the domicile by operation of law, the domicile assigned to a person who has not legal capacity to choose a domicile, such as the unemancipated minor, the married woman (in some states), or the mentally incompetent person.

H. CLARK, *supra* note 84, at 145.

87. *Id.*

88. *Id.*

89. For example, husband and wife live in different states by mutual agreement; husband in state X and wife in state Y. Wife's legal status is controlled in large part by the laws of state X. She may not be allowed to vote in state Y, or to claim state Y as her domicile for purposes of diversity jurisdiction, or to pay tuition as an in-state student at the state university in Y, *even if she has been a life-long resident of Y.*

This rule represents another vestige of the common law doctrine of coverture.⁹⁰ Because husband and wife were one, they were deemed to have the domicile of the husband, and the husband had the sole right to determine that domicile. Some courts have justified the retention of this antiquated rule on the ground that society has an interest in encouraging family unity and that therefore a family should be allowed only one legally recognized domicile.⁹¹ Although this may be a desirable goal, the fiction that a married woman's domicile is her husband's runs counter to the dictates of the Equal Rights Amendment, as it gives married men the right to choose a domicile while it gives no such choice to the married woman. The objection that a law allowing husband and wife to establish separate legal domiciles encourages family dissolution⁹² is not convincing. It is unlikely that a couple's decision to establish different homes is influenced by the fact that they might lose certain rights or might experience legal inconveniences. It is more probable that a couple must separate because of job transfer, school commitment, or military obligations. As the rule is based on a sexual classification and does not fit within the narrow exceptions allowed under the Amendment,⁹³ it would likely be judicially invalidated.⁹⁴

Although no Minnesota statute codifies common law domicile, it would be wise for the Minnesota legislature to expressly abrogate the rule as it revises other discriminatory statutes. Although it is uncommon for a couple to live apart as a matter of choice,⁹⁵ a statutory provision for establishing a married person's domicile would be appropriate in order to clearly establish a married woman's right to take advantage of the services of the state in which she lives.

The legislature has two alternatives in drafting a domicile statute. First, it could require that every family have one official domicile. The choice of domicile would be a matter between husband and wife, and the husband's place of residence would not automatically dictate the domicile of the wife. Because of the possibility of marital disagreement, such a statute would

90. L. KANOWITZ, *supra* note 20, at 47. See also Brown *et al.*, *supra* note 3, at 941.

91. See Younger v. Gianotti, 176 Tenn. 139, 142, 138 S.W.2d 448, 449 (1940).

92. H. CLARK, *supra* note 84, at 146.

93. See text accompanying notes 7-12 *supra*.

94. Brown *et al.*, *supra* note 3, at 941.

95. Other than situations where they are legally separated or divorced.

probably be as impractical as the present common law rule. The second alternative and the better choice would be a statute which allowed each married adult to establish his or her own domicile. If husband and wife were living apart for any reason, each could establish his or her own domicile for all legal purposes. The question of children's domicile where parents are living apart could be handled in an equally straightforward manner. Domicile would be determined by the domicile of the parent with whom the child was actually living or by the domicile of the parent that had legal custody.⁹⁶

F. INHERITANCE TAX EXEMPTIONS

Minnesota statutes allow a widow a \$30,000 inheritance tax exemption, while a widower may claim only a \$6,000 exemption.⁹⁷ The legislative rationale behind the substantial inequality in the size of the exemption most likely was that married women generally have fewer total assets than married men. Although these assumptions are probably correct in a large number of cases,⁹⁸ they result in an overbroad classification, as there are cases where women leave substantial estates to husbands who do not have the means or the health to provide for themselves.

Court-ordered relief from this discriminatory exemption scheme would be limited. A court could allow both widows and widowers a \$6,000 exemption or a \$30,000 exemption.⁹⁹ The more likely choice for a court would be the \$30,000 exemption, as this would extend a benefit to men rather than reducing a benefit to women.¹⁰⁰ The Minnesota legislature, on the other hand, is not limited to either figure. Whether it chooses to allow a substantial tax exemption for all surviving spouses depends upon its determination of the many complex policy issues involved in in-

96. *Brown et al.*, *supra* note 3, at 943.

97. MINN. STAT. § 291.05 (1971) provides in part:

The following exemptions from the tax are hereby allowed:

(3) (i) Property or any beneficial interest therein of the clear value of \$30,000 transferred to the widow, shall be exempt.

(5) Property or any beneficial interest therein of the clear value of \$6,000 transferred to the husband, any adult child or other lineal descendant of the decedent . . . shall be exempt.

98. The income of women workers is about 60 percent of men worker's income. See WOMEN'S BUREAU, U.S. DEPARTMENT OF LABOR, BULL. NO. 294, 1969 HANDBOOK ON WOMEN WORKERS 133.

99. See text accompanying note 15 *supra*.

100. See L. KANOWITZ, THE LAW SCHOOL CURRICULUM AND THE LEGAL RIGHTS OF WOMEN: PROPERTY 16 (1972) (mimeo).

heritance tax law.¹⁰¹ However, if the Amendment is ratified, the legislature must revise the statute if it wishes to avoid judicial extension or limitation of the exemption.

III. LABOR LEGISLATION

A. PROTECTIVE LABOR LEGISLATION

1. History

Virtually every state has laws which provide special treatment for women workers. Many of these were originally passed at the turn of the century to protect women workers from the inhuman working conditions and long working hours of factories.¹⁰² The growth of state protective legislation for women was in part due to early United State Supreme Court decisions such as *Lochner v. New York*¹⁰³ which held that states could not pass protective legislation aimed at all workers. In *Muller v. Oregon*¹⁰⁴ advocates of such legislation were able to convince the Court that women as a class were in need of such protection, and that the state's interest in protecting women outweighed any interference with the individual's right to contract in his labor relations. The Court upheld a maximum hours law which applied to females only, noting that:

The two sexes differ in body structure, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation,

101. The major issue, of course, is whether the legislature wishes to allow more people to obtain a higher exemption from the inheritance tax, which would be the result of allowing both widows and widowers the \$30,000 exemption. Such a change in the law will cost the state revenues in the form of inheritance taxes. Balanced against that may be a desire to allow widows and widowers to hold on to the bulk of the family income and assets, without heavy taxation, in order that their remaining years be more economically secure.

102. See *Hearings on S.J. Res. 61 Before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess., at 729 (1970) for a summary of various states' protective labor law provisions. Protective labor legislation was also the result of pressure by male workers wishing to protect their own position:

In many cases, men who saw their own occupations threatened by unwelcome competitors, demanded restrictions upon the hours of work of those competitors for the purpose of rendering women less desirable as employees.

J. KELLY, *SOME ETHICAL GAINS THROUGH LEGISLATION* 133 (1905).

103. 198 U.S. 45 (1905).

104. 208 U.S. 412 (1908).

and upholds that which is designed to compensate for some of the burden which rests upon her.¹⁰⁵

The Supreme Court later rejected the thinking of cases such as *Lochner* and held that states and the federal government could indeed enact protective labor legislation for all workers.¹⁰⁶ But the legacy of *Lochner* remained, and protective labor legislation aimed solely at women and children remained in force in all states.¹⁰⁷

The Equal Rights Amendment has been attacked on the grounds that it will reverse the hard-fought struggle for women's protective labor legislation.¹⁰⁸ Certainly some of the protective labor laws, such as maximum hours and minimum wage legislation, had as their origins a desire to protect women workers. Other forms of such legislation, however, particularly those state laws that banned women altogether from certain types of employment, were perhaps directed at controlling the supply of workers in order to insure higher wages for the men who worked at those jobs.¹⁰⁹ Whatever the motivation for the legislation, it has become clear that protective labor legislation for women often prevents women from advancing from the lowest paying jobs where they are presently concentrated.¹¹⁰ One commentator states:

[E]ven aside from the question of the motivation for the legislation, a closer examination of the legislation will show that it often actively hurts women, and fails to help where help is

105. 208 U.S. at 422-23.

106. See, e.g., *United States v. Darby*, 312 U.S. 100 (1940).

107. See note 102 *supra*.

108. See the testimony of Kenneth A. Meiklejohn, Legislative Representative of the AFL-CIO, printed in *Hearings on S.J. Res. 16 Before the Senate Committee on the Judiciary*, 91st Cong., 2d Sess., at 465. Mr. Meiklejohn expresses the fear that the practical effect of the Equal Rights Amendment will be to destroy protective labor laws rather than to extend them to men.

109. See J. KELLY, *supra* note 102, at 133.

110. Speaking of minimum wage laws applied to women only, one commentator states:

More important, the existence of [such] laws applying to women only in 7 States should not be allowed to obscure the fact that such laws simply do not deal with the *real* problem for women—exploitation by being underpaid and funneled into the lowest-paying, most menial jobs of our society. (Women constitute more than 75% of the total employed in the following fields: Bookkeepers; cashiers; dressmakers, seamstresses; housekeepers, private-household; nurses, professional; office-machine operators; operatives, apparel and accessories; operatives, knitting mills; practical nurses; schoolteachers; stenographers, typists, and secretaries; telephone operators; waitresses.) Preserving minimum wage laws for women has only resulted in a situation where full-time employed women earn about 60% of what full-time employed men earn.

needed. The most obvious harm is that both categories of State legislation [laws conferring supposed benefits and laws prohibiting women from work in certain jobs] have been used as an excuse not to hire women or not to promote them to better paying jobs.¹¹¹

In recent years, state labor laws enacted to "protect" women have been threatened by federal law. Title VII of the Civil Rights Act of 1964¹¹² prohibits discrimination on the basis of sex.¹¹³ Partially in response to Title VII, ten states have repealed their maximum hours legislation for women.¹¹⁴ Federal District Courts have struck down maximum hour legislation in five states as in conflict with Title VII.¹¹⁵ In thirteen jurisdictions, attorney generals' opinions have concluded that their hours laws are not applicable to employers covered under Title VII.¹¹⁶

Title VII, however, has not completely eliminated discriminatory legislation. Procedures for challenging such laws are cumbersome¹¹⁷ and, in addition, Equal Employment Opportunity Commission policy limits the application of the relevant provisions of Title VII to situations where an employer wishes to raise a state protective labor law as a defense to a charge of employment discrimination.¹¹⁸

S. ROSS, SEX DISCRIMINATION AND "PROTECTIVE" LABOR LEGISLATION, printed in *Hearings on Sec. 805 of H.R. 16098 Before the Special Subcommittee on Education of the Committee on Education and Labor of the House of Representatives*, 91st Cong., 2d Sess., pt. 1, at 596 (1970).

111. S. Ross, *supra* note 110, at 594. For a description of the recent case law in the area see *id.* at 599.

112. §§ 701-16, 42 U.S.C. §§ 2000e to e-15 (1970).

113. See *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971). See also 29 C.F.R. §§ 1604.1-.7 (1972).

114. Arizona, Colorado, Delaware, Montana, Nebraska, New Jersey, New York, Oregon, Vermont, Wisconsin. 118 CONG. REC. 4403 (daily ed. Mar. 21, 1972).

115. California, Illinois, Massachusetts, Ohio, Pennsylvania. 118 CONG. REC. 4404 (daily ed. Mar. 21, 1972).

116. California, District of Columbia, Illinois, Kansas, Massachusetts, Michigan, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Washington, and Wisconsin. 118 CONG. REC. 4403 (daily ed. Mar. 21, 1972).

117. Under Title VII an employee who believes he or she has been discriminated against can bring a complaint to the Equal Employment Opportunity Commission [hereinafter EEOC]. After protracted hearings and attempts to negotiate a settlement, a complainant may get a finding of probable cause from the Commission, at which point he or she may sue the employer. See note 113 *supra*.

118. The EEOC guideline states:

(1) Many states have enacted laws . . . with respect to the employment of females. . . .

(2) The Commission believes that such State laws and regu-

2. *Protective Labor Legislation in Minnesota*

Enactment of Title VII has had no substantial effect on Minnesota protective labor legislation. The Equal Rights Amendment, on the other hand, would have an immediate effect on laws which apply exclusively to women workers. These include a maximum hours law,¹¹⁹ a weight lifting statute,¹²⁰ and several health and safety regulations.¹²¹ If the Equal Rights Amendment is ratified, the Minnesota Supreme Court's response to these laws will probably be to invalidate those that restrict a woman's participation altogether in an occupation and extend to men those laws which now confer special benefit on women only.¹²²

In general, labor legislation which confers clear benefits upon women would be extended to men. Laws which are plainly exclusionary would be invalidated. Laws which restrict or regulate working conditions would probably be invalidated, leaving the process of general or functional regulation to the legislatures.¹²³

a. *The Maximum Hours Law*

The Minnesota law regarding maximum work hours for women provides in part:

No female shall be employed in any public housekeeping, manufacturing, mechanical, mercantile, or laundry occupation,

lations, although originally promulgated for the purpose of protecting females, have ceased to be relevant to our technology or to the expanding role of the female worker in our economy. The Commission has found that such laws and regulations do not take into account the capacities, preferences, and abilities of individual females and tend to discriminate rather than protect. Accordingly, the Commission has concluded that such laws . . . will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.

29 C.F.R. § 1604.1(b) (1972).

119. MINN. STAT. § 181.18 (1971).

120. MINN. STAT. § 183.25 (1971).

121. MINN. STAT. §§ 183.24, 182.09, 182.06, 182.44 (1971).

122. See S. REP. NO. 689, 92d Cong., 2d Sess., at 15 (1972):

Ratification of the Equal Rights Amendment will result in equal treatment for men and women with respect to labor laws of the States, as in other legal matters. This will mean that such restrictive discriminatory labor laws as those which bar women entirely from certain occupations will be invalid. But those laws which confer a real benefit, which offer real protection, will, it is expected, be extended to protect both men and women. Examples of laws which may be expanded include laws providing for rest periods or minimum wage benefits or health and safety protections. Men are now sometimes denied the very real benefits these laws offer.

123. Brown *et al.*, *supra* note 3, at 963.

or as a telephone operator, for more than 54 hours in any one week.¹²⁴

Because the maximum hours statute applies only to women workers, and does not fall within the narrow exceptions to the general rule of the Amendment,¹²⁵ it would likely be declared unconstitutional.¹²⁶ A court could either strike down the law in its entirety or hold the law applicable to both men and women.¹²⁷ Since the latter holding would have a drastic effect upon the labor market in Minnesota, it is likely that a court would strike down the law rather than expand its coverage. The legislature may wish to preserve some form of maximum hours legislation applicable to both sexes, however, and could revise section 181.18 accordingly.¹²⁸

The President's Commission on the Status of Women¹²⁹ and the Minnesota Governor's Commission on the Status of Women have repeatedly recommended changes in state maximum hours legislation.¹³⁰ The Committee on Protective Labor Legislation of The President's Commission on the Status of Women has recommended (for both sexes) a maximum workweek of 48 hours

124. MINN. STAT. § 181.18 (1971). The statute also provides exceptions in certain emergencies, and in certain occupations:

Sections 181.18 to 181.23 shall not apply to cases of emergency in which the safety, health, morals, or welfare of the public may otherwise be affected, or to cases in which night employees may be at a place of employment for no more than 12 hours and shall have opportunity for at least four hours of sleep, or to employees engaged in the seasonal occupation of preserving perishable fruits, grains, or vegetables, where such employment does not continue over a longer period than 75 days in any one year, or to telephone operators in municipalities of less than 1,500 inhabitants. Upon application by any employer, the commission may, in its discretion, for cause shown exempt any employee or class of employees from these provisions. During emergency periods of not to exceed four weeks in the aggregate in any calendar year, the commission may, in its discretion, allow longer period of employment for such female employees under such general rules and regulations as the commission may prescribe and adopt.

125. See text accompanying notes 7-12 *supra*.

126. See Brown *et al.*, *supra* note 3, at 927.

127. See text accompanying note 15 *supra*.

128. MINN. STAT. §§ 181.41 & .43 (1971), prohibiting boys and girls under certain ages from being employed in specific occupations and at certain hours will require revision to provide equal legislative protection for both boys and girls.

129. See THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON PROTECTIVE LABOR LEGISLATION 9 (1963); PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMAN 37 (1963).

130. See REPORT OF THE MINNESOTA GOVERNOR'S COMMISSION ON THE STATUS OF WOMEN at B-7 (1965).

or less, a maximum eight hour workday,¹³¹ and premium pay for work beyond 40 hours a week.¹³² Other commentators have agreed with the principle that maximum hours legislation is a necessary protective measure and that such laws should be revised to include men as well as women rather than being struck down entirely.¹³³ Coupling maximum hours legislation with premium pay legislation would provide an effective deterrent to long, forced hours of labor,¹³⁴ and would also allow for those employees who desired to work overtime.¹³⁵

b. Weight, Health and Safety Regulations

Minnesota health and safety regulations which would be threatened by the Equal Rights mandate include section 183.25, which prohibits female foundry workers from lifting cores in excess of 25 pounds;¹³⁶ section 183.24, which prohibits women from placing cores into ovens or taking them out regardless of the core's weight;¹³⁷ section 182.09, which prohibits women from oiling and cleaning moving machinery;¹³⁸ section 182.06, which requires that "where women are employed, or where it is deemed necessary by the department, stairways shall be built solid and without openings between the treads;"¹³⁹ and section 182.44, which provides that women shall be provided with seats and, where possible, seats with backs in all places where women are employed.¹⁴⁰

131. See REPORT OF THE COMMITTEE ON PROTECTIVE LABOR LEGISLATION, *supra* note 129, at 11 (1963).

132. *Id.* at 9.

133. A representative of the Minnesota Department of Labor and Industry has noted that the Department receives numerous complaints about forced overtime from both men and women.

Mrs. Myra K. Wolfgang in her testimony before the Senate Subcommittee on Constitutional Amendments reported that in Michigan there was a three month period when there were no hours laws due to legislative mistake. She testified that during that period the Chrysler Motor Co. put its women on a schedule of 12 hours a day, seven days a week, until some workers had to quit. See *Hearings, supra* note 108, at 327.

134. See THE PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, AMERICAN WOMAN 36 (1963).

135. MINN. STAT. § 181.24 (1971) presently provides for a "standard" work day of 10 hours for both sexes beyond which all labor apparently must be voluntary. There is no limitation on the number of days per week.

136. MINN. STAT. § 183.25 (1971).

137. MINN. STAT. § 183.24 (1971).

138. MINN. STAT. § 182.09 (1971).

139. MINN. STAT. § 182.06 (1971).

140. MINN. STAT. § 182.44 (1971).

The legislature must analyze all of these statutes to determine whether the protections provided are necessary, and if so, for whom. Certainly the weight lifting statute¹⁴¹ should not be extended to include all men as well as all women. However, it may be desirable to fashion a physical requirements test that must be passed by every employee before he or she is allowed to lift such weights. Such a test would assure that a strong woman would not be precluded from holding a job which required heavy lifting. Similar tests could be created to discover whether the individual possesses those physical attributes which underlie the laws precluding women from placing cores into ovens¹⁴² and prohibiting women from cleaning moving machinery.¹⁴³ On the other hand, the legislature may decide merely to repeal these laws without any reenactment. The law which requires closed stairways in places where women work¹⁴⁴ should be placed in this latter category. The legislature should also consider extending the benefits of women's protective labor legislation to men; for example, the legislature might determine that seats be required for both men and women where practicable.¹⁴⁵

Certainly the legislature's response to the Equal Rights Amendment should not be to abolish employment health and safety regulations; there is every indication that employee health and safety continue to be jeopardized in American industry.¹⁴⁶ It is perhaps time for the state, as it revises these laws, to provide protection for all workers, male as well as female.

B. UNEMPLOYMENT COMPENSATION

The Minnesota Unemployment Compensation law's general eligibility test is that an unemployed worker be "available" for and "able" to work.¹⁴⁷ The principal disqualification provisions relate to voluntary discontinuance of employment¹⁴⁸ or discharge for misconduct.¹⁴⁹ However, the Minnesota disqualification for pregnancy covers women who voluntarily remove themselves from the labor force *and* women who are discharged or given a

141. MINN. STAT. § 183.25 (1971).

142. MINN. STAT. § 183.24 (1971).

143. MINN. STAT. § 182.09 (1971).

144. MINN. STAT. § 182.06 (1971).

145. See MINN. STAT. § 182.44 (1971).

146. See generally F. WALLICK, *THE AMERICAN WORKER: AN ENDANGERED SPECIES* (1972).

147. MINN. STAT. § 268.08(3) (1971).

148. MINN. STAT. § 268.09(1) (1971).

149. MINN. STAT. § 268.09(1) (1971).

mandatory leave of absence because of pregnancy.¹⁵⁰ Thus, the general test of eligibility, availability and ableness to work, is not applied to the woman who has been involuntarily laid off because of her pregnancy. This pregnancy disqualification is unlike any other disqualification provision in the law. All other disqualifications relate to an *individual's* willingness and ability to work or to his or her misconduct on the job. The disqualification clearly discriminates against women because it is applicable to *any* woman who is discharged or forced to take a leave of absence, regardless of an individual woman's ability to continue at her job.

It could be argued that this disqualification falls within the "uniqueness" exception to the Equal Rights Amendment¹⁵¹ since pregnancy is a condition endemic to women. An indication of judicial response to both the challenge of the disqualification and the defense of unique characteristics can be found in two decisions invalidating compulsory maternity leave regulations, which are based on the same unique physical characteristic. A federal district court in Texas recently struck down such a regulation as discriminatory against women under Title VII,¹⁵² and another court reached the same result on equal protection grounds.¹⁵³ It is likely that the Minnesota unemployment compensation exclusion would be subjected to a similar analysis.

The recommendation of the Committee on Social Insurance and Taxes of the President's Commission on the Status of Women provides a guideline for legislative revision of section 268.09(2):

Disqualifications from unemployment compensation in respect to pregnancy and maternity should be based on reasonable tests of the ability and capacity of the individual to work and should not be determined by arbitrary time periods before and after birth which do not fit the variation in physical ability of women workers, in types of job, and in working conditions.¹⁵⁴

A statute modeled on this recommendation would provide pregnant women with adequate health protection and at the same

150. MINN. STAT. § 268.09(2) (1971). The provision states: "If such individual is separated from his employment because of pregnancy"

151. See text accompanying notes 10-12 *supra*.

152. *Schattmen v. Texas Employment Commission*, 3 FEP Cases 311 (W.D. Tex. Mar. 4, 1971), 3 FEP Cases 468 (W.D. Tex. April 16, 1971).

153. *Cohen v. Chesterfield Cty. School Bd.*, 39 U.S.L.W. 2686 (E.D. Va. May 17, 1971). See also *Brown et al.*, *supra* note 3, at 930.

154. PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON SOCIAL INSURANCE AND TAXES 40-55, Recommendation 5 (1963).

time would afford individual women the benefits accorded other workers in our society.

IV. CRIMINAL LAW

A. ADULTERY AND FORNICATION

The Minnesota adultery statute provides that a *married* woman and *any* man other than her husband are guilty of adultery if they have sexual intercourse.¹⁵⁵ The penalty for this felony is imprisonment for not more than one year and/or a fine of not more than \$1,000.¹⁵⁶ The fornication statute provides that a *single* woman and *any* man are guilty of fornication if they have sexual intercourse.¹⁵⁷ Fornication is a misdemeanor.¹⁵⁸

The Minnesota fornication and adultery statutes do not provide for the equal treatment required under the Equal Rights Amendment.¹⁵⁹ The statutes assume that a married woman who has sexual intercourse with a man not her husband will always be guilty of adultery and subject to the more severe penalty for that crime; whereas a married man who engages in sexual intercourse with a woman not his wife may be guilty of adultery or fornication depending on the marital status of the female. A single woman can never be charged with adultery, but can be charged with fornication; a married woman can never be charged with fornication, but may be found guilty of adultery; and both single and married men may be found guilty of adultery or fornication depending solely on the marital status of the female partner.¹⁶⁰ Thus, men and women who commit essentially the same crime are subject to vastly different penalties.¹⁶¹

155. MINN. STAT. § 609.36 (1971).

156. *Id.*

157. MINN. STAT. § 609.34 (1971).

158. *Id.*

159. See text accompanying notes 5-12 *supra*.

160. Adultery statutes in the United States generally fall into two categories—those which are based upon the canon law and those which are based upon the English common law. The canon law, applied by the Ecclesiastical Courts of England, condemned adultery as a violation of the marriage vow. Thus, when a married person had sexual intercourse with a single person, the act was adultery on the part of the married person and fornication on the part of the single person regardless of the sex of either. Under the English common law, on the other hand, adultery was significant only as it tended to expose a husband to the maintenance of another man's children and to the claims of spurious offspring upon his estate. Thus, the courts were concerned primarily with preventing sexual intercourse between a man and any married woman. See W. CLARK & W. MARSHALL, *CRIMES* § 11.04 (6th ed. 1958); R. PERKINS, *PERKINS ON CRIMINAL LAW* 377 (2d ed. 1969).

161. For instance, a married man who has sexual intercourse with a single woman can only be charged with fornication, whereas a married

If it determined that the state has an interest in maintaining such laws,¹⁶² the Legislature may look to several states for non-discriminatory adultery and fornication statutes. Illinois and Michigan are two jurisdictions that have enacted nondiscriminatory definitions of adultery.¹⁶³ The Illinois statute provides:

Any person who cohabits or has sexual intercourse with another not his spouse commits adultery, if the behavior is open and notorious, and (1) the person is married and the other person involved in such intercourse is not his spouse; or (2) the person is not married and knows that the other person involved in such intercourse is married.¹⁶⁴

The Michigan statute is somewhat less complex in wording, providing:

Adultery is the sexual intercourse of two persons, either of whom is married to a third person.¹⁶⁵

A statute constitutionally defining fornication could simply read:

When any single man and single woman have sexual intercourse with each other, each is guilty of fornication.

The Legislature might, of course, wish to consider removing fornication from the criminal statutes altogether.

woman who has sexual intercourse with a single man can be charged with adultery.

If this law and other criminal statutes discussed in this section are not revised by the legislature upon ratification of the Equal Rights Amendment, persons convicted under these statutes would have an excellent chance of getting their convictions overturned on the ground that the statutes are unconstitutional. See *Brown et al.*, *supra* note 3, at 915.

162. See Comment to 38 ILL. ANN. STAT. § 11-7 (1972):

Adultery involves an affront to a specific marriage relationship, in addition to an affront to the institution of marriage in general. It was felt that this more seriously offends the public peace. Moreover, there is an added element of danger created by the adulterous relationship in that the aggrieved spouse may create a tumultuous and dangerous situation in seeking his private vengeance. (See *City of Chicago v. Murray*, 333 Ill. App. 233, [77] N.E.2d [452] (1947))

But see Advisory Committee Comment to MINN. STAT. § 609.36 (1954), which noted that the American Law Institute had recommended that adultery not be made a crime.

163. ILL. ANN. STAT. § 11-7 (1972); MICH. COMP. LAWS ANN. § 750.-29 (1968).

164. ILL. ANN. STAT. § 11-7 (1972). The Minnesota Advisory Committee to the 1963 Criminal Code noted that a majority of the Committee felt that the Minnesota adultery law should be revised in the manner of the Illinois statute. See Advisory Committee Comment to MINN. STAT. § 609.36 (1954).

165. MICH. COMP. LAWS ANN. § 750.29 (1968).

B. STATUTORY RAPE

In Minnesota, a person having sexual intercourse with a female under 18 years old not his wife is guilty of statutory rape.¹⁶⁶ Sentence ranges from one to thirty years, depending upon the age of the female victim.¹⁶⁷ The only Minnesota statute covering young males who are sexually assaulted by females is the indecent liberties statute which protects only children under the age of 16 and which provides a maximum penalty of only seven years.¹⁶⁸ The age of lawful consent to sexual activity also differs under this statutory framework. There is no consent exception in the statutory rape statute, which applies only to young females.¹⁶⁹ Young men over the age of 16, however, are deemed capable of giving such consent to heterosexual intercourse.¹⁷⁰ The legislature seems to have determined that females under the age of 18 are *incapable* of giving meaningful consent to sexual intercourse whereas males are capable of such consent at age 16.

Such inequality in protection under the law would be subject to question upon ratification of the Equal Rights Amendment. Although it may be argued that this statutory scheme is constitutional under the unique physical characteristics test,¹⁷¹ the real discrimination in the statutes arises from the differing ages of consent to sexual acts.¹⁷² Therefore, the legislature should decide at what age a person can, in fact, give meaningful consent. Further, provision should be made for the statutory rape of young males.

166. MINN. STAT. § 609.295 (1971).

167. *Id.*

168. MINN. STAT. § 609.296 (1971) provides:

Subdivision 1. Whoever takes indecent liberties with a person not his spouse, without the latter's consent expressly given, may be sentenced as follows:

(1) If the person upon whom the indecent liberties are taken suffers great bodily harm as a result of the indecent liberties, to imprisonment for not more than ten years;

(2) In any other case, to imprisonment for not more than four years.

Subd. 2. Whoever takes indecent liberties with any child under the age of 16 years or induces any child under the age of 16 years to perform an indecent act, may be sentenced to imprisonment for not more than seven years. For prosecutions commenced pursuant to the provisions of this subdivision, it shall be no defense that the child consented to such acts or indecent liberties.

169. MINN. STAT. § 609.295 (1971).

170. Neither males nor females under the age of 18 can consent to homosexual acts. MINN. STAT. § 609.293(4) (1971).

171. See text accompanying notes 10-12 *supra*.

172. See generally Brown *et al.*, *supra* note 3, at 958.

C. CRIMINAL NONSUPPORT

Section 609.375¹⁷³ provides that a person is guilty of non-support if he is legally obligated to provide support to his wife or child and he knowingly fails without lawful excuse to do so. Penalties including a possible five year sentence are provided.¹⁷⁴ If it can be properly assumed that the statute is subject to the interpretation given its predecessors,¹⁷⁵ only men are subject to criminal penalties. Thus, the support law imposes a duty on men it does not impose on women and, since it does not fall within the exceptions to the Amendment,¹⁷⁶ it would likely be found unconstitutional. The legislature should revise this section along with revision of the civil support statute.¹⁷⁷ If the civil support statute¹⁷⁸ is revised to provide that husband and wife both have support obligations *inter se* and to their children, section 609.375 need only be revised to provide that:

Whoever is legally obligated to provide care and support to his spouse or his child, whether or not its custody has been granted to another, and knowingly omits and fails without lawful excuse to do so is guilty of nonsupport of said spouse or child, as the case may be, and upon conviction thereof may be sentenced to imprisonment for not more than 90 days or to payment of a fine of not more than \$300.¹⁷⁹

Such a revision would conform to the mandate of the Amendment and would complement the proposed equalization of the support duty between husband and wife.¹⁸⁰

V. EXEMPTION FROM JURY SERVICE¹⁸¹

Although all states grant women the right to be a juror, 23 states, including Minnesota, provide special exemptions for

173. MINN. STAT. § 609.375 (1971).

174. *Id.*

175. The Attorney General of Minnesota, interpreting a predecessor statute, held that a mother's desertion of her child did not amount to child abandonment since the father had the primary responsibility for support and maintenance of children. OP. ATT'Y GEN. no. 10, 56 (1924).

176. See text accompanying notes 5-12 *supra*.

177. See text accompanying notes 25-45 *supra*.

178. MINN. STAT. § 518.05 (1971).

179. The remainder of section 609.375 could be revised to conform to the language suggested to replace subsection (1).

180. See text accompanying notes 25-45 *supra*.

181. Under the common law, jury service was confined to males. 3 W. BLACKSTONE, COMMENTARIES *362. It was only with the enfranchisement of women in 1920 that a large number of states began to extend jury service to women. Before the passage of the 19th amendment, only California, Kansas, Michigan, Nevada, Utah, and Washington had granted women both the right to vote and the right to serve on a jury. Soon after the passage of the 19th amendment, a majority of states enacted legislation providing for jury service for women. See

women¹⁸² not provided to men.¹⁸³ The Minnesota statute is not unlike that of a number of states in both its history and wording.¹⁸⁴ The statute provides in part that "any woman drawn upon either a grand or petit jury may, in the discretion of the court, be excused from such jury service upon request."¹⁸⁵ The legislature may have provided the exemption for a number of reasons. Traditionally, women were considered to be socially unfit for the environs of the courtroom. The argument that the legislature felt family life would suffer as a result of a woman's absence from the home is supported by the existence of statutes in other states which specifically provide exemptions for child care and household duties.¹⁸⁶

Because the Minnesota exemption provides special treatment for women, it would be in violation of the general mandate of the Amendment.¹⁸⁷ The legislature should therefore consider revising the jury duty statute.¹⁸⁸ Many of the assumptions upon

Note, *Jury Service for Women*, 12 U. FLA. L. REV. 224 (1959); Comment, 51 MINN. L. REV. 442 (1967). While it is likely that such extensions were the result of a general agitation in favor of women's rights, many women automatically became eligible for jury service as a result of state laws which provided that all legal voters were qualified to be jurors.

At present, no state excludes women from jury service. As late as 1962, however, there were still three states which prohibited women from serving on juries. See PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON CIVIL AND POLITICAL RIGHTS 11 (1963). In fact, it was only with the advent of the Civil Rights Act of 1957 that women secured the right to sit on federal juries.

182. See *Hearings on S.J.Res. 61*, *supra* note 102, at 725.

183. Thus the statute will in all likelihood be invalidated after ratification. See text accompanying notes 5-12 *supra*.

184. See *Hearings on S.J.Res. 61*, *supra* note 102, at 725.

185. MINN. STAT. § 628.49 (1971).

186. See *Hearings on S.J. Res 61*, *supra* note 102, at 725.

187. See text accompanying notes 5-12 *supra*. In 1961, the United States Supreme Court in *Hoyt v. Florida*, 368 U.S. 57 (1961), upheld the constitutionality of a Florida statute which required women, but not men, to register with the clerk of court in order to be eligible for jury duty. It seems probable that the Court would have come to a similar result if the Minnesota exemption provision were challenged on equal protection grounds, although there is some doubt as to whether the Court would uphold *Hoyt* today. See *Brown et al.*, *supra* note 3.

188. The Minnesota Governor's Commission on the Status of Women has recommended that the legislature amend MINN. STAT. § 628.49. See REPORT OF THE MINNESOTA GOVERNOR'S COMMISSION ON THE STATUS OF WOMEN at D-2 (1965). The Committee on Civil and Political Rights of the President's Commission on the Status of Women noted that the Committee believed that there was an urgent need for state legislative reform with respect to jury service eligibility, exemption, and excuse in order to achieve equal jury service in the states. See REPORT OF THE COMMITTEE OF PROTECTIVE LABOR LEGISLATION, *supra* note 129, at 12 (1963).

which special exemptions were based have lost their validity. One commentator argues that it is somewhat anomalous to permit women to determine that jury duty is "inconsistent with [their] own special responsibilities" when the special responsibilities of men often include holding a job and providing a family's income.¹⁸⁹ Further, the law does not distinguish those women who have a home and family to care for from those who do not. The exemption provision could easily be revised to conform with the Amendment and retain provisions deemed to be of social utility. The present statute allows both men and women ample opportunity to request relief from duty in such situations as family sickness, personal illness and other hardship situations.¹⁹⁰ If parental child care is deemed a social value outweighing civic responsibilities, the legislature might specifically provide exemption for child care by either father or mother.¹⁹¹ On the other hand, the legislature might wish to provide increased jurors' fees to cover the cost of day care.¹⁹²

VI. CONCLUSION

The Equal Rights Amendment has been sent to the states

189. See L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 30 (1969).

190. MINN. STAT. § 628.49 (1971) provides:

The court shall not excuse from service upon either grand or petit jury any person duly drawn and summoned, except upon the ground that he is either physically or mentally unable or unfit, in the opinion of the court, to attend or serve as a juror, or by reason of serious sickness of some immediate member of his family, or there is a showing and the court believes that extraordinary hardship will result if one summoned is not excused; provided, in counties having more than two terms of court a year the court may, for other sufficient causes, excuse a juror from service for which he was so drawn and summoned until a later term of court or period during the same year, and in such case such juror shall report for service and serve at such later term or period with the same force and effect as though he had been regularly drawn and summoned for such later term or period.

The Governor's Commission on the Status of Women has declared that it feels this is sufficient for women as well as men. See note 130 *supra*.

191. Such an approach was recommended by the President's Commission Committee on Civil and Political Rights, REPORT, *supra* note 181, at 14, which reports that such a provision already exists in the laws of California, Colorado, Michigan, Montana, and New Jersey.

192. MINN. STAT. § 357.26(1) (1971) provides a \$10 juror's fee for each day of attendance in court and a \$6 a day attendance fee for courts in counties which contain a city of the first class. In addition to the \$6 fee a mileage allowance is provided. Whether this is sufficient to cover the current cost of child care is open to argument. It is unlikely that such a fee covers the loss of income for most persons.

for ratification. If it is approved by the requisite 38 states, the legislature of the State of Minnesota will then have two years within which to conform a small number of important statutes. Since the few statutes which require substantive revision would almost certainly be subject to judicial challenge in their present form, the task facing the legislature is important. Even if the Amendment should fail to be ratified, the legislature should make the recommended statutory changes. Such action would be consistent with the expressed policies of the legislature regarding equality of rights. Within the framework of equalization, the legislature has the opportunity to substantively reform many areas of Minnesota law to achieve more equitable treatment for the men and women of the state.

